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No. 85-142

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD KASVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a person can be found guilty of aiding and abetting an existing conspiracy.

2. Whether double jeopardy principles barred the court of appeals from affirming petitioner's conspiracy conviction on the ground that the evidence was sufficient to prove him guilty of conspiracy, even though the trial court had expressed the contrary view.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 757 F.2d 887.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1985. A petition for rehearing was denied on May 14, 1985. The petition for a writ of certiorari was filed on July 25, 1985, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to distribute marijuana, in violation of 21 U.S.C. 846 and 18 U.S.C. 2. He was sentenced to five years' imprisonment and fined $15,000. Pet. App. A1.

The evidence at trial established that petitioner obtained quantities of marijuana on a regular basis over the course of several years from a large-scale marijuana distribution enterprise. He also delivered sums of money to the enterprise and on at least one occasion supplied the enterprise with high quality marijuana that he had obtained from another source. Sometime in late 1977 or early 1978, four of petitioner's co-defendants agreed to purchase, sell, and distribute marijuana (Tr. 91-92, 108, 164-165). By 1981, petitioner, whose name and telephone number were kept by the enterprise in code, had become its largest customer. But unlike an ordinary customer, who would pay for his purchases upon receipt, petitioner simply picked up quantities of marijuana from the headquarters of the enterprise and periodically delivered to the enterprise sums of money that bore no particular relationship to the amounts of marijuana he had carried away on any specific occasion. Pet. App. A2-A3.

On April 9, 1982, federal law enforcement officers raided the group's headquarters. Petitioner and several others were arrested at this time, and the police ultimately seized 234 pounds of marijuana (Tr. 12-13, 21, 24-25, 28, 30-39). Between July 1981, when the enterprise began recording its transactions, and the April 1982 raid, petitioner obtained more than 3,600 pounds of marijuana from the enterprise and paid it more than $1 million (Tr. 464-469). He also supplied the group with 20 pounds of Jamaican marijuana and more than three pounds of sinsemilla, a high quality, seedless variety of marijuana (Tr. 459-460, 465).

2. Petitioner, along with seven others, was charged in Count I of a four-count indictment with conspiring to distribute and possess marijuana and in Count IV with the substantive offense of possession with intent to distribute. At the close of the government's evidence, the trial judge expressed the view that the evidence was insufficient to establish that petitioner had conspired to distribute marijuana. The judge found, however, that the evidence was sufficient to go to the jury on an aiding and abetting theory. Accordingly, he dismissed Count IV against petitioner but allowed Count I to go to the jury with instructions on both aiding and abetting and conspiracy. The jury subsequently found petitioner guilty "as charged in Count One of the indictment." Pet. App. A3-A5.

The court of appeals affirmed (Pet. App. A1-A11). The court concluded that the evidence at trial established that petitioner knew of the existence of the conspiracy at the time he acted and that "his acts [also] aided and abetted the business of the conspiracy" (Pet. App. A6). The court of appeals accordingly held that the evidence was sufficient to support his conviction on that theory (*id.* at A6-A7). The court rejected petitioner's contention that, as a matter of law, one cannot aid and abet an existing conspiracy. Relying upon its more detailed explanation in *United States* v. *Galiffa,* 734 F.2d 306 (7th Cir. 1984), in which one of petitioner's co-defendants had raised substantially the same claim, the court of appeals held that one can be convicted of aiding and abetting a conspiracy even where he neither acts "as a liaison for the parties to the conspiratorial agreement" nor "participat[es] in the original agreement" (Pet. App. A6). The court of appeals also rejected the contention that the use of an aiding and abetting instruction was an impermissible amendment of the indictment (*ibid.*). Finally, the court held that the evidence was in any event sufficient to find petitioner guilty of conspiracy as charged in Count I (*id.* at A8-A9).

Judge Swygert dissented (Pet. App. A12-A28). He argued that the majority's interpretation of the aiding and abetting statute was too broad. He also argued that the district court's statement that it believed the evidence insufficient to support a conspiracy conviction precluded the court of appeals from affirming the conviction.

ARGUMENT

1. a. Petitioner contends (Pet. 7-12) that it is impossible to be guilty of aiding and abetting a conspiracy that has already been formed. As the court of appeals explained in detail in *Galiffa,* 734 F.2d at 309-311, this is simply not so. One is guilty of aiding and abetting if he " 'in some sort associate[s] himself with the venture, * * * participate[s] in it as in something that he wishes to bring about, [and] * * * seek[s] by his action to make it succeed.' " *Nye & Nissen* v. *United States,* 336 U.S. 613, 619 (1949) (quoting *United States* v. *Peoni,* 100 F.2d 401, 402 (2d Cir. 1938)). In cases where a conspiracy exists and a person takes deliberate action to further the object of the conspiracy, he is guilty of the above-described conduct and ought to be liable as an aider and abettor. This is true even though the individual could not be liable as a conspirator in the absence of an express or implied agreement with others to bring about the object offense.

If petitioner's contention were correct, there could be cases in which clearly culpable conduct that Congress sought to make subject to aider and abettor liability would go unpunished. Suppose, for example, that a group of former employees planned to set fire to a business in retaliation for their perceived mistreatment by the employer, and a competitor learned of the plot. If the competitor, for reasons of his own and unbeknownst to the conspirators, were to take some action to assist the plan, such as disabling the nearby fire hydrant, it seems clear that he ought to be guilty of aiding and abetting. Yet he is

not guilty of conspiracy because he did not reach an agreement with anyone else. And if the arson is not consummated, he would not be guilty of aiding and abetting a substantive offense. In that case we submit that he ought to be guilty of aiding and abetting the conspiracy, just as the conspirators would be guilty of conspiracy even though the object was not accomplished. Under petitioner's contention, the competitor would go unpunished for his conduct. See generally *Galiffa,* 734 F.2d at 309-310 & n.7. There is no reason for such an anomalous result, and we are aware of no case reversing an aiding and abetting conviction on the ground that it is impossible to aid and abet an existing conspiracy; on the contrary, the courts have generally indicated that there is no bar to the charge of aiding and abetting an existing conspiracy. See *United States* v. *Walker,* 621 F.2d 163 (5th Cir. 1980), cert. denied, 450 U.S. 1000 (1981); *United States* v. *Alvarez,* 610 F.2d 1250, 1257, aff'd, 625 F.2d 1196 (5th Cir. 1980) (en banc), cert. denied, 451 U.S. 938 (1981); *United States* v. *Lane,* 514 F.2d 22 (9th Cir. 1975).

There can be no doubt that petitioner's conduct here sufficiently associated him with the criminal venture to make him an aider and abettor (see Pet. App. A6-A9). Petitioner obtained more than 3600 pounds of marijuana from the conspiracy in a nine-month period and supplied the conspiracy with more than $1 million and various narcotics; this made him considerably more than a "mere buyer" (see Pet. 12).[1]

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[1] Because there is also no doubt that petitioner knew of the massive drug distribution conspiracy and every indication that he was part of it, the court of appeals also correctly concluded that the evidence was sufficient to show that he was a member of the conspiracy. Indeed, petitioner does not suggest any theory under which the jury conceivably could have found that petitioner was an aider and abettor, but not a conspirator. Hence, even if petitioner were correct that it is not possible to aid and abet a conspiracy, such an error could not have affected the jury's verdict, and the conspiracy conviction ought to stand. See Point 2, *infra.*

b. For the reasons stated by the court of appeals in *Galiffa* (734 F.2d at 311-312), there is no merit to petitioner's contention (Pet. 12-15) that the trial court impermissibly amended the indictment by charging the jury on an aiding and abetting theory. It is well established that a person indicted as a principal may be convicted on evidence showing that he was an aider and abettor. See, *e.g.*, *United States* v. *Walker*, 621 F.2d at 166; *Levine* v. *United States*, 430 F.2d 641, 643 (7th Cir. 1970) (citing cases), cert. denied, 401 U.S. 949 (1971); *Nye & Nissen* v. *United States*, 168 F.2d 846, 855 (9th Cir. 1948), aff'd, 336 U.S. 613 (1949). The evidence germane to the aiding and abetting charge here was the same as that relevant to the conspiracy charge; there was no unfair surprise and therefore no basis for objecting to the aiding and abetting instruction on the ground that the indictment did not mention 18 U.S.C. 2. See generally *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985).

2. Petitioner objects (Pet. 15-19) to the court of appeals' alternative holding that his conviction should be affirmed because the evidence was sufficient for the jury to find him guilty of conspiracy. Invoking the Double Jeopardy Clause, petitioner contends that the district judge's statement that he believed that the prosecution's evidence on this point was insufficient forecloses the court of appeals' affirmance on this ground. This contention is without merit.

First, as the court of appeals noted (Pet. App. A8), given that the trial court in fact submitted the case to the jury on instructions that permitted it to find petitioner guilty of conspiracy, there seems little basis for the contention that the court effectively "acquitted" him of the conspiracy charge, as petitioner maintains (Pet. 15). In any event, even if petitioner's premise were correct and the court had "acquitted" him by opining that the evidence was legally insufficient, that would raise no double jeopardy bar to the court of appeals' decision. The essence of

the protection of the Double Jeopardy Clause is the protection against twice being put in jeopardy through successive trials. Here, petitioner is not being subjected to a second trial; the court of appeals has simply affirmed the jury's finding of guilt, and hence the Double Jeopardy Clause is not implicated.

Petitioner's characterization of the trial court's ruling as an acquittal does not insulate it from appellate review; a holding that the evidence is insufficient is a legal ruling that is subject to de novo review as long as it is appealable, *i.e.*, as long as a reversal on appeal would not require further proceedings that would violate the Double Jeopardy Clause.[2] Thus, it is well established that a post-guilty-verdict judgment of acquittal is appealable. *United States* v. *DiFrancesco,* 449 U.S. 117, 130 (1980). Even under petitioner's premise, this case is indistinguishable from such an acquittal; regardless of the trial court's view of the evidence, the jury has entered a guilty verdict that can be reinstated (or, in this case, affirmed) without the need for further proceedings in the trial court. Clearly, this implicates no double jeopardy considerations.[3]

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[2] The court of appeals did not err in failing to give deference to the trial court's ruling on this legal question or in failing to consider the effect of the court's acquittal of petitioner on Count IV. That acquittal was quite irrelevant to the court's consideration of the conviction on Count I. Even if the two verdicts could not logically be reconciled, there is generally no bar to inconsistent verdicts. *United States* v. *Powell,* No. 83-1307 (Dec. 10, 1984); *Harris* v. *Rivera,* 454 U.S. 339 (1981).

[3] In a case in which further proceedings would be required in the trial court, the question would arise whether they would be barred by the Double Jeopardy Clause. Where the defendant deliberately seeks a mid-trial termination of the trial by the court, further proceedings following a successful government appeal may not violate double jeopardy. *United States* v. *Scott,* 437 U.S. 82 (1978). This principle arguably may extend to a purely legal determination by the court that the evidence is insufficient. See *Commonwealth* v. *Zoller,* 490 A.2d

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1985

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394 (Pa. 1985), cert. granted, *sub nom. Smalis* v. *Pennsylvania,* No. 85-227 (Nov. 4, 1985). Because no new trial or further trial proceedings are required by the judgment in this case, there is no reason to hold it for the decision in *Smalis.*